Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-531

CARL L. RITCHIE,
Petitioner,

v.

STATE OF GEORGIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE
GEORGIA COURT OF APPEALS

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The Petitioner respectfully prays that a writ of Certiorari issue to review the opinion and judgment of the Georgia Court of Appeals entered in the above case on April 4, 1978. The Supreme Court of Georgia denied certiorari on June 9, 1978. (Appendix B).

OPINION BELOW

The opinion of the Georgia Court of Appeals is not yet reported, but a copy thereof is set forth in Appendix A hereto.

JURISDICTION

The Judgment of the Georgia Court of Appeals was entered on April 4, 1978. Thereafter, the Supreme Court of Georgia denied a timely filed Petition for Writ of Certiorari on June 9, 1978. A copy of said denial is set forth herein in Appendix B. A timely Motion for Reconsideration to the Supreme Court of Georgia set forth herein as Appendix C, was denied on June 29, 1978. The Court's jurisdiction is invoked under Title 28 United States Code § 1257(3).

QUESTIONS PRESENTED

1. Are the press materials charged against Petitioner not obscene as a matter of law, constituting expression protected under the Fourth and Fourteenth Amendments to the United States Constitution?

2. Does a state statute which defines *scienter* in a manner which authorized obscenity convictions on mere "constructive" knowledge impermissibly chill the dissemination of materials protected under the First and Fourteenth Amendments to the United States Constitution?

3. Is there any rational basis upon which a state may totally prohibit and impose criminal penalties for the dissemination of devices designed or marketed as useful primarily for the stimulation of human genital organs?

4. May a warrantless mass seizure of allegedly obscene material be sustained under the plain view doctrine consistent with First and Fourteenth Amendment guarantee?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the First, Fourth, and Fourteenth Amendments to the United States Constitution are set forth in Appendix D hereto.

STATEMENT

Petitioner was convicted in the Criminal Court of Fulton County of distributing obscene materials, the charges being predicated upon the sale of two magazines at the Climax Adult Book Store, and the warrantless seizure of alleged sexual devices. Petitioner was alleged to have been an employee of the store at the time of the mass seizure and the sale.

Petitioner was then tried before a jury in the Criminal Court of Fulton County and found guilty. He thereafter appealed his conviction to the Georgia Court of Appeals which affirmed the trial judgment in all respects in a judgment and opinion for which review is sought by this Petition.

REASONS FOR GRANTING THE WRIT

I.

THE MATERIALS UPON WHICH PETITIONER'S CONVICTION RESTS MAY NOT, AS A MATTER OF APPLICABLE CONSTITUTIONAL LAW, BE HELD OBSCENE SINCE THEY CONSTITUTE EXPRESSION PROTECTED UNDER THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The Court is respectfully requested to independently review the alleged obscenity of the magainzes "Pleasure Tools" and "Hot Cheerleaders" upon which Petitioner's conviction is predicated. The doctrine necessitating an independent appellate review of the alleged obscenity of materials found obscene at the trial level had its origins in this Court's decision in *Manual Enterprises, Inc. v. Day*, 370 U.S. 478 (1962). That case involved action by a local postmaster in withholding delivery of certain magazines after finding them obscene. The publishers who had mailed the magazines brought suit in the United States District Court seeking injunctive relief, but their complaint was dismissed without opinion. The Court of Appeals affirmed the dismissal, holding that the evidence supported the administrative findings that the magazines were obscene and thus non-mailable matter. This Court reversed in a judgment announced by Mr. Justice Harlan.

The Court thought the dispositive question to be whether or not the magazines were in fact obscene, 370 U.S. at 488. On this issue, the Court noted that the determination below had been made under improper assumptions as to the law of ob-

scenity. The Court, however, decided against remanding the case for an initial determination of the obscenity issue below:

> "Whether this question [of obscenity] be deemed one of fact or of mixed fact and law, see Lockard and McClure, Censorship of Obscenity: The Developing Constitutional Standards, 45 Minn L Rev 5, 114-115 (1960), we see no need of remanding the case for initial consideration by the Post Office Department or the Court of Appeals of this missing factor in their determinations." 370 U.S., at 488.

The Court decided that the determination of that issue must ultimately rest with it:

> "That issue, involving factual matters entangled in a constitutional claim, see *Grove Press, Inc. v. Christenberry* (CA 2 NY) 276 F.2d 433, 436, is ultimately one for this Court. The relevant materials being before us, we determine the issue for ourselves."*Id.*

The doctrine of independent review was again invoked by this Court in *Jacobellis v. Ohio*, 378 U.S. 184 (1964). The continuing validity of the *Jacobellis* doctrine and of the appellate duty it imposes was affirmed here recently in the case of *Jenkins v. Georgia*, 418 U.S. 153 (1974). That case involved a conviction under a state obscenity statute founded upon the exhibition of the film "Carnal Knowledge." The Court reversed the conviction based upon its own viewing of the film, and the finding that the film could not, as a matter of constitutional law, be held obscene.

This Court is respectfully called upon to perform the judicial duty above delineated and thus to determine the ob-

scenity *vel non* of the magazines "Pleasure Tools" and "Hot Cheerleaders." An item of similar explicitness was before this Court in *Jenkins v. Georgia, supra.* In reversing an obscenity conviction based upon the film "Carnal Knowledge" the Court there noted that the film did contain scenes of nudity. The Court nonetheless reversed the conviction, noting:

> "There are occasional scenes of nudity, but nudity alone is not enough to make material legally obscene under the Miller standards." 418 U.S. 153, 161.

The material presently before this Court is similar to that involved in the *Jenkins* decision. Whether or not the Court might find this material to be "soft core" pornography, it is clearly not "hard core" pornography. The Court in *Jenkins* noted that material must be "hard core" in order to support a constitutional conviction. The Court quoted from *Miller* to the effect that:

> "No one [may be constitutionally prosecuted] for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct." 418 U.S. 153, at 160 quoting 413 U.S. 1, at 25.

The Court thus went on to reverse the conviction since the film "Carnal Knowledge" was simply not a "public portrayal of *hard core* sexual conduct." 418 U.S. 153, at 161.

The magazines "Pleasure Tools" and "Hot Cheerleaders" are simply not hardcore sexual material. When judged by the standards set forth in *Miller* and reaffirmed in *Jenkins* the conclusion is inescapable that the magazines constitute protected speech under the First and Fourteenth Amendments of the United States Constitution.

In light of this Court's pronouncement that no one may be constitutionally prosecuted in this area except for the sale of "materials which depict or describe patently offensive 'hard core' sexual conduct," 418 U.S., at 153, the decision below is so clearly erroneous as to justify summary reversal. At the very least, however, plenary review if required before Petitioner's conviction may be affirmed.

II.

A STANDARD OF SCIENTER WHICH AUTHORIZES OBSCENITY CONVICTIONS ON MERE "CONSTRUCTIVE" KNOWLEDGE IMPERMISSIBLY CHILLS THE DISSEMINATION OF EXPRESSION PROTECTED UNDER THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

In its charge to the jury, the trial court gave the following instruction on the issue of *scienter:*

> ". . . the word 'knowing', as I have used it, shall be deemed to be the actual knowledge or constructive knowledge of the obscene contents of the subject matter. A person has constructive knowledge of the obscene contents if he has the knowledge of facts which would put a reasonable and prudent person on notice as to the suspect nature of the material." (Te. C-43)

This instruction is in accord with the terms of Georgia Criminal Code §26-2101(a) which Petitioner challenges. The seriousness of this question is well demonstrated by the fact

that *certiorari* has been granted on this precise issue in *Ballew v. Georgia*, No. 76-761, question number 2, *certiorari* granted January 25, 1977. The *Ballew* case was decided on other grounds, however, and this Court therefore did not reach the issue of "constructive knowledge." See *Ballew v. Georgia*, 435 U.S., (1978) (*Ballew I*), decided March 21, 1978. In *Ballew v. Georgia*, No. 77-1425, (*Ballew II*) decided June 12, 1978, the dissent by Justices Brennan, Stewart, and Marshall indicates that these Justices would have granted *eertiorari* on the *scienter* issue in the following words:

> "I see no reason to suppose that this issue is any less worthy of consideration on certiorari now than it was when we accepted in in *Ballew I*. For this reason, I would grant certiorari."

Furthermore, the dissenting opinions by Justices Brennan, Marshall, and Stewart in *Sewell v. Georgia*, No. 76-1738, and in *Teal v. Georgia*, No. 77-790, both decided April 24, 1978, indicate that from a constitutional standpoint, jury instructions permitting a basing of *scienter* on "actual or constructive knowledge" are impermissible under the Constitution of the United States.

Petitioner contends that predicating a conviction upon a finding of "constructive knowledge" is constitutionally impermissible under *Hamling v. United States*, 418 U.S. 87 (1974), where this Court enunciated the constitutional minimum standard of *scienter* as follows:

> "We think the 'knowingly' language of 18 U.S.C. §1461 and the instructions given by the district court in this case satisfy the constitutional requirements of *scienter*. It is constitutionally sufficient

> that the prosecution show that the defendant *had* knowledge of the contents of material he distributes, and that he knew the character and nature of the materials.' 418 U.S. at 123 (Emphasis added)."

Consistent with the above statement from Hamling, Petitioner contends that the prosecution must show that he "had" knowledge rather than that he "should have had" knowledge of the content, character and nature of the materials with which he was charged. In addition, it is here submitted that the dissenting opinions by three United States Supreme Court Justices, namely Justices Brennan, Marshall, and Stewart in *Teal,* and *Sewell, supra,* amply demonstrate the substantiality of the question. Indeed, Justice Brennan, with whom Justice Marshall joined, dissenting, states with regard to the constitutionality of Georgia Code §26-2101(c):

> "In *Ballew v. Georgia,* 435 U.S. (1978), we granted certiorari to consider, but did not reach, the precise *scienter* issue now raised by appellant . . . I see no basis for concluding that a federal constitutional question sufficiently substantial to be granted review on certiorari is now so insubstantial to require exercise of our mandatory appellate jurisdiction in this case." *Sewell, supra,* at 3.

The United States Supreme Court's dismissal of the appeals in *Teal, Sewell, and Ballew II* thus clearly did not go to the merits of the *scienter* arguments, especially in light of the recognition by Justices Brennan, Marshall, and Stewart of the importance of the question raised and the desirability of having various aspects of those issues further illuminated.

Petitioner submits that the instruction on *scienter,* as given by the trial Court, fails to meet the constitutional minimum

standards of *scienter* set forth by this Court in *Hamling, supra.* As the Court is aware, the principles governing the issue of *scienter* in the area of First Amendment litigation originates with the decision in *Roth v. United States,* 354 U.S. 476 (1957).

In deciding *Roth v. United States, supra,* the Court stated that the obscenity statutes there involved and as construed were not too ambiguous to define a criminal offense. Each of the cases cited to support this ruling, however, stressed the fact that the respective statute involved was directed only at those with guilty knowledge or intent. See, e.g., *United States v. Petrillo,* 332 U.S. 1, 7-8 (1947); *United States v. Harris,* 347 U.S. 612, 624 n. 15 (1954); *Boyce Motor Lines, Inc. v. United States,* 342 U.S. 337, 340 (1952); *United States v. Ragen,* 314 U.S. 513, 523-524 (1942); *United States v. Wurzbach,* 280 U.S. 396 (1930); *Hygrade Provisions Co. v. Sherman,* 266 U.S. 497 (1925).

The constitutional validity of the obscenity statutes involved in *Roth* rested therefore, in significant measure upon the understanding that the statutes were not intended to apply to those who distribute material dealing with sex, but only to those who had knowledge that the particular material distributed was of obscene character and content.

The issue finally was resolved by the decision in *Smith v. California,* 361 U.S. 147 (1959). It was there held that the strict liability feature of the California obscenity ordinance there involved was seriously restricting the circulation of books which were not obscene, "by penalizing booksellers, even though they had not the slightest notice of the character of the books they sold." 361 U.S. at 152. The tendency of the

California ordinance, this Court held, was to erode fundamental freedoms of speech and press by holding a bookseller criminally liable for possessing an obscene book, "wholly apart from any *scienter* on his part regarding the book's obscenity." 361 U.S. at 160.

In *Mishkin v. New York*, 383 U.S. 502 (1966), the Court stated:

> "The Constitution requires proof of *scienter* to avoid the hazard of self-censorship of constitutionally protected material and to compensate for the ambiguities inherent in the definition of obscenity." 383 U.S., at 511.

In approving the authoritative interpretation placed upon the New York obscenity statute by the highest court of the state with respect to the "stringent *scienter* requirement" and "vital element of *scienter*," 383 U.S., at 507, 510 n.5, the Court specifically noted that a parenthetical reference in the Court of Appeals' opinion to "knowledge of the contents of the books" was not to be read as a "modification of this definition of scienter." 383 U.S., at 510n.9

Hamling, supra, sets forth that the prosecution must show that a defendant "had" knowledge of the content, character, and nature of the materials with which he is charged and that the jury must be thusly instructed. To hold otherwise would permit conviction solely on the basis of guesses and assumptions of police officers that a particular sexual device is obscene. To this effect, it is stated in the dissent in *Sewell, supra:*

> ". . . the constructive *scienter* requirement of §26-2101(a), at least as applied in appellant's trial, pro

vides no reasonable assurance that persons will know or ought to know when they are likely to violate §26-2101(c)." *Sewell*, at 5.

The Justices thus recognize the impermissible chilling effect produced by the constructive knowledge instructions given in Petitioner's case. It is Petitioner's contention that when instructions of "constructive knowledge" are given, every purveyor of presumptively protected First Amendment material is at the mercy of an unpredictable jury determination that some facet of the title or cover of the material he distributes gave him reason to refrain from distributing such material until he could complete a review of it.

Thus, unless a statute is clear as to what conduct is prohibited, conviction can only be based on unconstitutional conjecture warranting reversal. Erroneous instructions by the Court were given in *Fortner v. State*, 528 S.W.2d, 378 (Ark. 1975). Here the defendants were convicted of selling an obscene motion picture film and they appealed. The Supreme Court of Arkansas held that the evidence as to one of the defendants was insufficient to support the conclusion that she had knowledge that the film sold was obscene. The *scienter* requirement was thus not fulfilled, and the jury's verdict as to her, therefore, finding her guilty of unlawful sale of an obscene film, in the Court's opinion, had to have been based on surmise or conjecture and her motion for directed verdict should have been granted. The scienter required to sustain a conviction for the unlawful sale of obscene motion pictures is more than a mere belief which warrants further inspection or inquiry. The trial Court's instructions which read:

"As used herein, 'knowingly' means having a general knowledge of, or reason to know, or a belief which

> warrants further inspection or inquiry of the character and content of a film which is reasonably susceptible of examination by the defendant." 528 S.W.2d at 381.

were clearly erroneous as to the portion reading: "or a belief . . ." For these reasons, the Supreme Court of Arkansas reversed the judgment as to both appellants and remanded for a new trial.

Not only are jury instructions of "constructive knowledge" unconstitutional and in violation of Petitioner's First, Fourth, and Fourteenth Amendment rights under the United States Constitution, they are also contrary to the rulings of the majority of states in the United States who recognize that the constitutional minimum standard of *scienter* requires actual knowledge, and not mere constructive knowledge, whether it be proved by direct or circumstantial evidence. These decisions may be categorized into a three level approach, namely (a) actual knowledge of the content, character and nature of the material; (b) specific or reasonable awareness of the content, character, and nature of the material; (c) knowledge of the character, nature and content of the material.

The first level approach as to "actual" awareness may be found in *Ginzburg v. United States,* 383 U.S. 463 (1966). In this case, the appellant was convicted pursuant to *Title 18 U.S. C.* § 1461 for knowingly sending obscene matter through the mails. The evidence clearly established that the appellant's materials were created, solicited, advertised, and pandered on their appeal to prurient interest: The appellant publisher was found to have deliberately emphasized the sexually provocative aspects of the material through his advertisements and circulars.

Justice Brennan, speaking for the majority, assumed that the material in the abstract could not have been ruled obscene, but he found a violation of the statute when the publications were viewed "against a background of commercial exploitation of erotica soley for the sake of prurient appeal," *supra* at 466. As evidence of this background, he pointed to the fact that the appellant had sought mailing privileges from post offices in Blue Ball and Intercourse, Pennsylvania. Thus, *scienter* was established by the appellant's purposeful and deliberate emphasis in advertising material that would appeal to prurient interest; therefore, it was in effect a proclamation on his part that the material was obscene.

It is significant to note that the appellant's marketing technique by virtue of the fact that it was in and of itself "pandering" was significant in the Court's determination that the appellant had actual knowledge of the explicit nature of the material.

In *Womack v. United States,* 294 F.2d 204 (D.C. Cir. 1960), *certiorari* denied, 365 U.S. 859 (1961), the defendant was convicted of knowingly mailing obscene material. The material consisted of unretouched photographs which the appellant admitted he purposefully designed to appeal to homosexual interests. The Court held the photographs to be hard-core pornography and stated that "there could be no possible avoidance of *scienter.*" Thus, the element of *scienter* was predicated upon the appellant's admitted awareness of the character of the material and his personal involvement in the actual photographing, assembling, and mailing of the material. Thus, "knowingly" as interpreted by the Court here was based on the appellant's actual awareness of the nature of the material he deposited in the mails.

In *United States v. Ewing*, 445 F.2d 945 (10th Cir. 1971), vacated and remanded on other grounds, 413 U.S. 913 (1971), the defendant was convicted of knowingly mailing obscene material. In this case, the defendant's knowledge of the explicit nature of the material was based on the testimony of his secretaries, business partners, and photographic models who testified that the defendant personally participated in the production of the material which was specifically designed to appeal to a sado-masochistic interest. The Court held that the "calculated purveyance of filth" found in *Mishkin v. New York*, 383 U.S. 502 (1966) was unquestionably present. Thus, *scienter* was established on the basis of the defendant's personal involvement in the production of the publications and his purposeful intent to create material which was specifically designed to appeal to a sado-masochistic type. It is apparent, therefore, that the *scienter* requirement was fulfilled by the defendant's *actual* knowledge of the material.

The issue of actual awareness was again addressed in *Hanf v. State*, 560 P.2d 207 (Okla. Ct. Crim. App. 1977). Refuting defendant's contention that the state failed to introduce sufficint evidence in *scienter* to justify the giving of circumstantial evidence instructions to the jury, the Court of Criminal Appeals of Oklahoma stated:

> "*Scienter*, a specific awareness of contents, which makes the publication obscene, is a necessary element of an obscenity statute. . . *'Scienter* does not mean that a defendant must have been aware at the time he sold the publication that the material it contained was obscene. It requires only that he was aware of the *actual* contents of the publication." 560 P.2d 210 (Emphasis added.)

The Court thus recognized that it is not a general, but a specific awareness on the part of the defendant, which must be proved to establish *scienter.* The proof required is not that the defendant was specifically aware of the legal obscenity of the publications sold, rather the proof required is that the defendant was specifically aware of the actual contents of the material at the time of sale.

Actual knowledge could not be proved in *Commonwealth v. Thureson,* 357 N.E.2d 750 (Mass. 1976). In this case, the appellant had worked in a bookstore for three days. She claimed that she did not know for whom she worked, and upon being questioned, responded to the police officer, that although she had a "pretty good idea" what was in the peep-show machines, she had never viewed the films. From these facts, the Supreme Judicial Court of Massachusetts reasoned that the prosecution failed to produce evidence "from which a jury could conclude beyond a reasonable doubt that the appellant had seen, or should have seen or otherwise has knowledge of, the materials' contents." Thus even though the defendant should have had knowledge of the contents, and even though she had a general idea of what was in the machines, she did not have actual knowledge, and the Court reversed appellant's conviction.

The second and third level approach by state and federal courts to the type of knowledge sufficient to fulfill the *scienter* requirement involve decisions which show the personal participation, words, acts, and conduct of a defendant, which clearly prove some cognizable knowledge of the contents, nature and character of materials the defendant transported, shipped, created or disseminated. Thus, in *Kingsley Books, Inc. v. Brown,* 334 U.S. 436 (1957), a New York statute which authorized local authorities to bring an injunction suit against any

In *Kahm v. United States,* 300 F.2d 78 (5th Cir. 1962), *certiorari* denied, 82 S.Ct. 949 (1962), the defendant was convicted for knowingly using the mails for the delivery of advertisements giving information as to where obscene material might be obtained. The element of *scienter* was predicated upon proof that the defendant had personally selected and published the material for transmittal, and he further admitted that he had knowledge of the contents. Thus, the evidence was sufficient to show that the defendant mailed what he knew to be sexually explicit. It is clear, therefore, that "knowingly" as interpreted by the Court was based on the defendant's admitted awareness of the nature of the material to be mailed.

In *United States v. Brown,* 328 F.Supp. 196 (D.C. Va. 1971), vacated and remanded, 413 U.S. 912, the defendant was convicted pursuant to *18 U.S.C. §1462* for "knowingly" using a common carrier for transporting copies of obscene books in interstate commerce. The evidence which established that Brown had knowledge of the explicit nature of the books came from his business associates who testified that the defendant personally selected and scrutinized the books in question. It is significant to note that the defendant in this case personly selected the books from a large stock pool. Thus, *scienter* was established upon the grounds that the defendant personally having perused the books in his selection process, was therefore, aware of their explicit nature.

In *Spillman v. United States,* 413 F.2d 527 (9th Cir. 1969), *certiorari* denied, 90 S.Ct. 265 (1970), the defendant was convicted of "knowingly mailing obscene material through the mail in violation of *18 U.S.C. §1461.* In this case, the evidence clearly showed that the defendant was present at every stage of the production of the film, and took a pre-dominant

role in the actual photography of the film. Thus, *scienter* was established by the defendant's *conduct*, which conclusively proved that he was aware of the film's content in that he actively participated in its creation.

In *Gold v. United States*, 378 F.2d 588 (9th Cir. 1967), the defendant was convicted pursuant to *18 U.S.C. §1462* of knowingly using a common carrier for carriage in interstate commerce of obscene films. The evidence showed that the defendant personally assisted in the processing, packaging and depositing of the films. Thus, the jury concluded that the defendant knew the contents of the shipment, and that his conduct in participating in the packaging and depositing of the films was conclusive of the fact that he was reasonably aware of the explicit nature of the films.

Awareness of content was established more recently in *United States v. Kelly*, 398 F.Supp. 1374 (D.C., E.D. Mich. 1975). This case invovled the conviction of a defendant indicted for knowingly using a common carrier for carriage in interstate commerce of obscene material, in which the United States District Court for the Eastern District of Michigan held that the only proof the government had to produce was that the defendant was aware of the contents of the matter shipped. This awareness of contents was furnished by a showing that the defendant wrote for credit from the shipper, and specifically noted missing titles. This conduct on the part of the defendant, then, constituted the outward manifestation of facts within the defendant's mind, and was sufficient to establish *scienter* of obscenity of the material shipped interstate by a common carrier.

The thread of commonality that runs through all of these decisions is that they require an *actual* (awareness) knowledge

real sense, such individuals might be held to actually know the content of the material despite the lack of a personal perusal.

What Petitioner does contend, is that he cannot be convicted in the absence of proof of what he actually knew, whether this actual knowledge is proved by circumstantial evidence or otherwise. Georgia's *scienter* standard encompassing constructive knowledge goes beyond this by imposing a duty to make inquiry whenever a jury decides that a reasonable and prudent person would have done so. The requirement of such inquiry, at the risk of criminal liability, would seriously inhibit the distribution of non-obscene material which has some allusion, however vague or insubstantial, to sex or nudity in its title or cover. This is precisely the impermissible chilling effect condemned in *Smith v. California*, 361 U.S. 147 (1969), and the constructive knowledge standard must thus be found constitutionally infirm.

III.

THERE IS NO RATIONAL BASIS UPON WHICH A STATE MAY TOTALLY PROHIBIT AND IMPOSE CRIMINAL PENALTIES FOR THE DISSEMINATION OF ANY DEVICE DESIGNED OR MARKETED AS USEFUL PRIMARILY FOR THE STIMULATION OF HUMAN GENITALS.

The state does not contend that the bulk of the material charged against Petitioner, the alleged sexual devices, are obscene under Georgia Criminal Code §26-2101(b) which sets forth the standard three part *Miller* obscenity test. Rather, they are alleged to violate Georgia Criminal Code §26-2101(c) which provides:

> "Additionally, any device designed or marketed as useful primarily for the stimulation of human genital organs is obscene material under this section."

The seriousness of this question is first demonstrated by the fact that the above definition contains none of the Constitutional limitations upon obscenity set forth by this court in *Miller v. California,* supra. Material may be found obscene under this statute even though it does not meet any of the three tests for obscenity set forth by this Court as Constitutionally necessary in the *Miller* decision. The seriousness of the question here presented is further demonstrated by the fact that the total prohibition of such devices bears no reasonable relationship to any conceivable public interest and has no rational basis.

In *Miller,* the Supreme Court noted that "state statutes designed to regulate obscene material must be carefully limited." 413 U.S. 15, at 23-24. As a result of the need for careful limitation, Supreme Court confined the permissible scope of any state obscenity statute to the regulation of materials which "depict or describe sexual conduct." 413 U.S. 15, at 24. It is clear that, whatever their intended use, the items do not depict sexual conduct.

Further, the Court in *Miller* went on to hold that any state obscenity offense must be limited to those materials which meet a three part test:

> "A state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portrays sexual conduct in a patently offensive way, and which, taken as a whole,

do not have serious literary, artistic, political, or scientific value." 413 U.S. 15, at 24.

The statute in question here sets forth an obscenity offense which is not limited to the category which the Supreme Court found acceptable in *Miller*. It is thus clearly unconstitutional for authorizing the suppression of material as "obscene" even though such material may not appeal to a prurient interest in sex, may not portray sexual conduct in any way, and may possess serious literary, artistic, political or scientific value.

Further, the statute is unconstitutionally vague in its definition of prohibited devices. A novelty item may be marketed or intended as an inducement to humor, but the vendors of such items can only guess as to what is meant by the phrase "intended or marketed primarily for the stimulation of human genital organs." It is clear that in the First Amendment area "government may regulate . . . only with narrow specificity." *NAACP v. Button*, 371 U.S. 415, 433 (1963). In so regulating, the State must avoid the use of language which is so vague that "men of common intelligence must necessarily guess as to its meaning." *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926).

Petitioner does not contend that a properly instructed jury could not find the items obscene if they were judged under the *Miller* obscenity standards. Petitioner concedes that similar devices have been held obscene under the three part *Miller* test in other cases. Petitioner objects that the devices in this case were judged not by that constitutionally acceptable three part standard but rather by a standard of obscenity which this Court has never approved.

In addition to falling outside any constitutionally approved standard of obscenity, the statute carries the state into areas where it has no conceivable public interest. In this regard it is important to note that the statute is not limited to the commercial utilization of sexual devices, rather, it prohibits any sale of any such device to any person. Individuals are thus prohibited from purchasing such items even for their own personal private use on their own bodies in the privacy of their own homes. The state has no possible interest in prohibiting an adult from masturbating in the privacy of his or her home. Likewise, there can be no rational basis for prohibiting the sale of items which such individuals might utilize in so masturbating.

This court has often invalidated legislation because it lacked a reasonable relationship to any public interest. In *Pierce v. Society of Sisters*, 268 U.S. 518 (1925), the court held an Oregon mandatory public school attendance statute invalid, noting:

> "As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the state." 268 U.S., at 636.

In *Meyer v. Nebraska*, 262 U.S. 390 (1923), the court overturned a state statute prohibiting the study of the German language, stating:

> "The problem for our determination is whether the statute as construed and applied unreasonably infringes a liberty, guaranteed . . . by the Fourteenth Amendment . . .the established doctrine is that this liberty may not be interfered with under the guise

> of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect." 262 U.S., at 399-400.

Even assuming, arguendo, that the state has some interest in regulating certain uses to which sexual devices might be put, the statute here in question is overbroad in its total prohibition of such devices. In *Shelton v. Tucker*, 364 U.S. 479 (1960) this court stated in this regard:

> "In a series of decisions, this court has held that, even though the goverment purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties ehen the end can be more narrowly reserved." 364 U.S., at 488.

In his concurring opinion in *Griswold v. Connecticut*, 381 U.S. 479 (1965), Mr. Justice Goldberg reiterated the importance of using the least restrictive alternative when government regulation is in question:

> "In a long series of cases this court has held that where fundamental personal liberties are involved, they may not be abridged by the state simply on a showing that a regulatory scheme has some rational relationship to the effectuation of a proper state purpose. 'Where there is a significant encroachment upon personal liberty, the state may prevail only upon showing a subordinating interest which is compelling. *Bates v. Little Rock*, 361 U.S. 516, 524. The law must be shown necessary and not merely rationally related to the accomplishment of a per-

missible state policy.' *McLaughlin v. Florida*, 379 U.S. 184, 196." 381 U.S., at 497.

This case is similar to that presented in *Griswold, supra*, where this court struck down a statute making any use of contraceptives a criminal offense. In finding that law unconstitutional, the court noted that it impinged upon a protected right to marital privacy. The prohibition in this case impinges upon the same fundamental right. The statute is not limited to the prohibition of the sale of such devices to minors not to the prohibition of the commercial use of such devices. It merely sweeps all devices within the definition of obscenity and therefore criminalizes their distribution to anyone, including married couples.

Although this court may not specify how a legislature is to meet legitimate social ends, it may prohibit the utilization of means that are unduly restrictive of individual freedom, *Dean Milk v. Madison*, 340 U.S. 349 (1951).

All of the above argument proceeds on the premise that the state has some legitimate interest in regulating the uses to which sexual devices might be put. Petitioner does not concede that the state has any such interest. But, even if it does, no possible rational basis can be imagined for total prohibition of such devices. No conceivable public interest can be served by prohibiting an individual from purchasing an item to further his own masturbation or to utilize in sexual activities with his spouse.

IV.

PETITIONER'S CONSTITUTIONAL RIGHTS AGAINST UNREASONABLE SEARCHES AND

SEIZURES WERE VIOLATED BY THE INTRODUCTION INTO EVIDENCE OF ALLEGEDLY OBSCENE ITEMS SEIZED BY LAW ENFORCEMENT OFFICERS WITHOUT A WARRANT.

The substance of the testimony at the trial was that a law enforcement officer purchases two magazines from Petitioner and thereafter arrested Petitioner and confiscated all the novelty items present. No warrant was obtained to seize the allegedly obscene items nor was any attempt made to secure one. As the officer testified, the warrantless mass seizure was conducted pursuant to his personal conclusion that the items were primarily intended for sexual stimulation.

The officers did not submit the question to a neutral magistrate for a determination of whether the items were obscene under Ga. Code §26-2101(c). There was no indication that the warrant could not be obtained or that it would be impractical to seek one. The officer testified that the devices were exhibited in a glass counter within the store and there is no indication that they would have been removed during the time it would take him to view the materials, describe his viewing to a neutral magistrate, and obtain a warrant. Indeed, the officer testified that Petitioner was the only individual working in the store at the time of his arrest, and there was thus no one present to remove the goods had they been left in the store following his arrest. It is thus clear that the officer had ample opportunity to secure a warrant for the seizure of the items both before and after the arrest of the Petitioner.

The principles applicable to the warrantless seizure of allegedly obscene material were set forth by United States Supreme Court in *Roaden v. Kentucky*, 413 U.S. 496 (1973).

The Court there held that the warrantless seizure of an allegedly obscene film was unconstitutional under the First, Fourth and Fourteenth Amendments. The Court noted that the determination of obscenity must be made by a neutral and detached magistrate rather than a zealous law enforcement officer vigorously pursuing his role in adversary process of controlling crime. The Court thus noted:

> "The seizure proceeded solely on the police officer's conclusions that the film was obscene; there was no warrant. Nothing prior to seizure afforded a magistrate an opportunity to focus searchingly on the question of obscenity.' " 413 U.S. 496, at 506.

The Court thought the issue was controlled by its prior decision in *Lee Art Theatre v. Virginia,* 392 U.S. 636 (1968). *Lee Art Theatre* held that the warrant for the seizure of allegedly obscene material may not be issued on the mere conclusory allegations of a police officer. In light of that holding, it is even more clear that an officer may not be allowed to make a seizure of such material with no warrant at all.

> "If, as Marcus and Lee Art Theatre held, a warrant for seizing allegedly obscene material may not issue on the mere conclusory allegations of an officer, a *fortiorari,* the officer may not make such a seizure with no warrant at all." 413 U.S. 496 at 506.

The same conclusion must be reached in this case, and the warrantless mass seizure of all the novelty items as "obscene" must be held unconstitutional. The Georgia Supreme Court, in the *Sewell* case, relied upon by the Court of Appeals herein, held that the mass seizure was justified under the "plain view" doctrine in that the items were in plain view. The issue is not

whether they were in view, however, but whether a police officer or a magistrate should make the determination of obscenity before any item is seized as obscene. The items in *Roaden, supra,* and in *Lee Art Theatre, supra,* were also in plain view, but this did not serve to sustain their warrantless seizure.

On the basis of the *Lee Art* and *Roaden* decisions alone, Petitioner submits that the decision below is so clearly erroneous as to justify summary reversal. At the very least, however, plenary review is called for before such a decision can be affirmed.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Georgia Court of Appeals.

Respectfully submitted,

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Atlanta, Georgia 30309
Attorney for Petitioner.

APPENDIX "A"

(Filed April 4, 1978)

55373.	PIERCE v. THE STATE.	25-49.
55374.	CALLAHAN v. THE STATE.	25-50.
55375.	WICKHAM v. THE STATE.	25-51.
55376.	RITCHIE v. THE STATE.	25-52.

BANKE, Judge.

Each of the above defendants was convicted of distributing obscene materials in violation of Code Ann. § 26-2101. Each attacked the constitutionality of the statute and appealed to the Supreme Court, which rejected the constitutional attacks and transferred the appeals to this court in *Pierce v. State*, 239 Ga. 844 (239 SE2d 28) (1977) and *Ritchie v. State*, 240 Ga. 15 (239 SE2d 741) (1977). Since the appeals are before us on identical enumerations of error and almost identical briefs, we have considered them together.

1. The appellants contend that the items seized were constitutionally protected forms of expression that cannot lawfully be termed obscene. Several of the publications introduced into evidence do not accompany the physical evidence transmitted to this court. Therefore, we are unable to make an independent determination of whether they are obscene as we would ordinarily be required to do under Jenkins v. Georgia, 418 U.S. 153, 160 (94 SC 2750, 41 LE2d 642) (1974). See *Dyke v. State*, 232 Ga. 817, 821 (209 SE2d 166) (1974);

Simpson v. State, ___Ga. App.___ (3) (SE2d) (No. 54669, Jan. 9, 1978). However, none of the convictions in the cases before us were dependent upon a finding that the missing publications are obscene, since each count which charges the distribution of one of the missing publications also charges distribution of various items of sexual paraphernalia. As to these counts, "the jury could lawfully return a finding of guilty of distributing obscene material upon being convinced beyond reasonable doubt that any one of the . . . items was obscene." *Robinson v. State*, 143 Ga. App. 37 (3), 39 (237 SE2d 436) (1977). From our own examination of the physical evidence, it is abundantly clear that these items were "designed or marketed as useful primarily for the stimulation of human genital organs . . ." Code Ann. § 26-2101 (c). Accordingly, the verdicts on these counts were authorized.

Two counts in Case No. 55376 were based solely upon publications, to wit: "Pleasure Tools and Their Uses" and "Hot Cheerleaders." We have examined both these publications and have concluded that they, too, are obscene as a matter of law; that is, applying contemporary community standards and considering each magazine as a whole, they appeal predominantly to the purient interest, lack serious literary, artistic, political or scientific value, and depict in a patently offensive way the types of sexual conduct specifically listed in the statute. Code Ann. § 26-2101 (b). Therefore, they are not protected expression under the first and fourteenth amendments to the United States Constitution (see Miller v. California, 413 U.S. 15 (93 SC 2606, 2607, 37 LE2d 419) ( ); *Simpson v. State*, ____ Ga. App. ___(3),(supra), and the verdicts on these counts were also authorized.

2. The appellants also urge that seizure of the sexual devices without a warrant violated the constitutional prohibition against unreasonable searches and seizures. This contention is without merit. See *Sewell v. State*, 238 Ga. 495 (2), supra; *Robinson v. State*, 143 Ga. App. 37 (5), supra; *Wood v. State*, 144 Ga. App. 236 (1) (SE2d) (1977); *Simpson v. State*, ___Ga. App. ___ (2), supra; *Underwood v. State*, ___ Ga. App. (3) (SE2d) (No. 54953, Feb. 3, 1978).

3. The jury instructions on constructive knowledge did not violate constitutional standards for proof of scienter. See *Sewell v. State*, 238 Ga. 495 (4), supra; *Wood v. State*, 144 Ga. App. 236 (3), supra; *Simpson v. State*, ___ Ga. App. ___ (4), supra.

Judgment affirmed. Deen, P.J.,concurs specially and Smith, J., concurs.

55373	PIERCE v. THE STATE.	25-49
55374	CALLAHAN v. THE STATE.	25-50
55375	WICKHAM v. THE STATE.	25-51
55376	RITCHIE v. THE STATE.	25-52

DEEN, Presiding Judge, concurring specially.

I fully concur with all that is said in the majority opinion. The evidence is abundant, ranging from magazines showing close up photography pornography of group sex, penis extensions, dildo's with hand cranks on the end for rotation and stimulation of sex organs, plastic vaginas, rubber female faces with extra large mouth openings, and one device listed in the *Manual of Erotic Sex* as an anal crank. Counsel referred to the latter: "i think a lot of these devices may be more anus oriented than

they are genitalia oriented." The trial judge ruled that if it is an anal device it is sexually oriented material.

The state's expert witness in the field of science was a professor at Georgia State and a clinical psychologist in private practice, relating the materials in evidence as appealing to the prurient interest within homosexuality. She testified that the latter was a personality disorder deviancy or sickness, and not a variancy. She stated "A. There are two fields of thought. If you are along the line of the biological approach, if you know your genetics - - - Q. And the hormones. A. - - -you know that it's quite possible for the child to be born with an XXV chromosome or XXY chromosome. It depends upon the genetic factors of the child. This is one theory. The other theory is that homosexuality is learned, that it comes from the environment, and there are good proponents on both sides."

Thus the testimony points up two differing philosophies within the parameters of the scientific community as to possible addiction or appeal of pornography to the prurient interest within homosexuality. First, that it is inherited through genetic factors of the child (some say if it is inherited genetically it is excusable in the law, and second, it is not phylogentically programmed but is only learned behavior or comes from circumstances within the environment. The expert then stated that as to the last theory there are still two additional "schools of thought." Some say it is acquired at the early age of five or six, while others believe it is learned later in life. After relating Dr. Frend's work in this field she stated there was absolutely no serious educational or scientific value in the magazines and materials.

Counsel's last question to this expert was: "Q. Doctor, does your philosophy or your testimony regarding homosexuality and prurient appeal have anything to do with your religious beliefs? . . . A. I might answer your question in this way: My religious belief is the philosophy I live by, and colors any thinking that I do in any way, shape, form, or fashion. Q. Thank you, ma'am. MR. SMITH: I have no further questions.

It is appropriate to note that there are also experts who testify as to the positive educational and scientific value of similar magazines and materials doing so based on their religious beliefs, philosophy, and commitments which color their thinking in every way, shape, form and fashion. See "Humanists: Manifesto II," a non-theistic religion, *Religious of America*, Leo Rosten, Simon and Schuster, N.Y. (1975), affirming "approved sexual freedom and sexual conduct between consenting adults (homosexuals)," as part of their religious creed, commandments, social action or faith. This is confirmed in an article written by James W. Prescott, Ph.D., entitled "Child Abuse in America" wherein Prescott, a board member of The American Humanist Association, a non-theistic religion, and developmental neuropsychologist with the National Institute of Child Health and Human Development of the U. S. Department of Health, Education and Welfare, states in the article: "Tension must be relieved, whether through the warm intimacy of sexual contact or through brutal acts of senseless violence." In effect he recommends premarital sex, promiscuity and pornography as a religious view, and as a deterrent to crime. Note the reverse in *Megar v. State*, 144 Ga. App. 564, 568 (___SE2d ___), and compare a quotation from the March 1, 1978, issue of the *Atlanta Journal* of Dr. Fred Crawford of the Emory University Center for Research in Social Change: "I've studied this for 30 years and I've seen plenty of evidence that there's a relationship between obscene material and sex crime, 'Crawford re-

lates. 'I'd say a large percentage of those who indulge in commercial sex are mentally ill, and some may be in danger of becoming psychotic,' he adds. He related a case he had studied of a 16-year-old boy charged with the rape and murder of a 5-year-old girl. 'He had pictures and magazines and books all over his house - - all sexually stimulating material.'"

In case no. 55374 two experts testified, one on each side of the case, one indicating the presence of serious educational and scientific value and the other stating there was none. The jury could believe either one or may "use their own common sense as intelligent human beings." *Feldschneider v. State.* 127 Ga. App. 745. 746 (195 SE2d 184) (1972). I would affirm the verdict of the jury.

APPENDIX B

CLERK'S OFFICE, SUPREME COURT OF GEORGIA
Atlanta June 9, 1978

Dear Sir:

Case No. 33770. Ritchie v. The State

The Supreme Court today denied the writ of certiorari in this case.

All the justices concur.

Very truly yours,

Mrs. Joline B. Williams
Clerk

APPENDIX C

CLERK'S OFFICE, SUPREME COURT OF GEORGIA
Atlanta 30334 June 29, 1978

Dear Sir:

Case No. 33770. Ritchie v. State

The motion for a reconsideration was denied today.

All the justices concur.

Very truly yours,

Mrs. Joline B. Williams
Clerk

APPENDIX D

Constitutional and Statutory Provisions

1. The pertinent provisions of the First Amendment are:

   "Congress shall make no law. . . abridging the freedom of speech, or the press. . ."

2. The pertinent provisions of the Fourth Amendment are:

   "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

3. The pertinent provisions of the Fourteenth Amendment are:

   "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction in the equal protection of the laws."

OCTOBER TERM, 1978

CERTIFICATE OF SERVICE

I certify that I have served three (3) copies of the Petition for Writ of Certiorari to the Georgia Court of Appeals in the above styled case upon LEONARD RHODES, Assistant Fulton County Solicitor, 53 Civil-Criminal Courts Building, Atlanta, Georgia 30303, and upon ARTHUR K. BOLTON, Georgia Attorney General, 132 State Judicial Building, Atlanta, Georgia 30334, by depositing same in the U.S. Mail in properly addressed envelopes with sufficient postage affixed thereto to insure delivery.

This 27th day of September, 1978.

ROBERT E. SMITH, Esq.

Attorney for Petitioner.